LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 23 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1103

MARY VIRGINIA SLADE, General Guardian of ROBERT ELKINS and MARK DAVID BROOKS,
Plaintiff,

versus

LOUISIANA POWER AND LIGHT COMPANY,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAYMOND H. KIERR
1718 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112

ROBERT G. HEBERT
608 American Bank Building
New Orleans, Louisiana 70130

Of Counsel:

J. STANLEY WAGNER
6325 Bridgehampton Drive
Suite H
New Orleans, Louisiana 70126

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statement of the Case	2
Reasons for Granting This Petition	3
Argument	3
Appendix A	10
Appendix B	15

AUTHORITIES

CASES: Page

Bengston v. Travelers Indemnity Company, 132 F. Supp. 512 (W.D. La. 1955) 6

Brimhall v. Simmons, 338 F. 2d 702 (CCA 6, 1964) 3

Danos v. Waterford Oil Company, 266 F. 2d 76 (CCA 5, 1959) 3

Erie Railway v. Tompkins, 58 S.Ct. 817 304 U.S. 64, 83 L. Ed. 1188 8

Fallat v. Gouran, 220 F. 2d 325 (CCA 3, 1954) 3, 5

Griffiths Estate v. Glaze Heirs, 7 So.2d (La. S. Ct., 1942) 4

Guaranty Trust Co. of New York v. York, 326 U.S. (99) p. 109, 65 S. Ct. (1461) p. 1470, 89 L. Ed. 2079 6

Morgan v. Potter, 15 S. Ct. 590 (1895) (App. p. ....) 5

Occidental Life Insurance Company of California v. Kielhorn, D.C. 98 F. Supp. 288, 293 6

Sibbach v. Wilson & Company, Inc. 312 U.S. 1, p. 14, 61 S. Ct. 422, p. 426, 85, L. Ed. 479 7

Barron & Holtzoff, Federal Practice & Procedure, Rule 17 7

Moore's Federal Practice, Vol. 3A (2d Ed.) Sec 17:20, p. 751 5

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1970

No.

MARY VIRGINIA SLADE, General Guardian of ROBERT ELKINS and MARK DAVID BROOKS,
Plaintiff-Appellant,

versus

LOUISIANA POWER AND LIGHT COMPANY,
Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner MARY VIRGINIA SLADE, prays that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the granting of a motion for summary judgment by the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The District Court for the Eastern District of Louisiana rendered an opinion which is reprinted as Appendix "A" hereof.

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the judgment is reprinted as Appendix "B" hereof.

JURISDICTION

Federal jurisdiction of this cause is predicated upon diversity of citizenship.

STATEMENT OF THE CASE

Plaintiff's wards, Mark Brooks and Robert Elkins, have a tort claim against the defendant growing out of an accident that occurred in Kenner, Louisiana on February 4, 1968.

In July of 1968, both boys were residing with plaintiff at her residence in Mississippi and on July 16, 1968, plaintiff was duly appointed as their general guardian. Acting in that capacity, plaintiff commenced this diversity action in the United States District Court for the Eastern District of Louisiana.

Defendant made a motion for summary judgment which was granted by the Court on March 20, 1969.

Petitioner then appealed to the United States Fifth Circuit Court of Appeals which affirmed the trial court's ruling on Otober 24, 1969. Hence, petitioner files this application for certiorari.

REASONS FOR GRANTING THIS PETITION

It is submitted that the instant decision of the Fifth Circuit Court of Appeals is in conflict with *Fallat v. Gouran*, 220 Fed. 2d 325 (CCA 3, 1954) and also that it will cause confusion by introducing State procedural rules into the federal forum, thereby disrupting the uniformity sought to be achieved by the Federal Rules of Civil Procedure. Furthermore, an examination of the jurisprudence and textual material makes it evident that considerable doubt and confusion exists as to the proper construction of F.R.C.P. 17, requiring clarification.

ARGUMENT

The trial Court's ruling was based solely upon the proposition that certain Louisiana State Court procedural articles controlled the guardian's capacity to sue in Federal Court. Plaintiff urges that this conclusion is erroneous because:

State Court procedural rules have no application in suits in the Federal forum

The validity of plaintiff's appointment is not questioned; the trial Court's opinion recognized that, as such, it was her citizenship, not that of the minors that would decide diversity. However, the trial Court held that under F.R.C.P. 17(b), the procedural rules of Louisiana State Courts controlled and did not authorize such an action by a foreign guardian, citing *Brimhall v. Simmons*, 338 F. 2d 702 (CCA 6, 1964) and *Danos v. Waterford Oil Company*, 266 F. 2d 76 (CCA 5, 1959). Neither decision supports the trial Court's rationale.

In *Brimhall*, the Court was deciding the right of a

non-resident guardian to appear for non-resident minors unless a Tennessee guardian were also appointed to act as a co-representative and co-plaintiff. The Court held that this statute did not apply to non-resident wards.

Danos v. Waterford, supra is an excellent illustration of the principle that it is the *substantive* not the *procedural* law of the state that is referred to in F.R.C.P. 17(b).

It covers representatives whose capacity to sue hinges upon their title, interest or *substantive right of action.* In *Danos*, plaintiff brought suit as the administrator of the estate of one long deceased. Under the law of Louisiana an administrator is primarily concerned with enforcing the payment of debts owed to the succession. Absent such obligations, the right of action belongs to the heirs who are the real parties in interest. This is further demonstrated by a Louisiana Supreme Court decision cited in the footnotes (*Danos* page 78; *Griffiths Estate v. Glaze Heirs*, 7 So.2d 62 La. S. Ct., 1942). A reading of this decision makes it apparent that in such situations that administrator's lack of capacity to sue is not based upon any state procedural rule, but rather that he has no *right of action* under the state's substantive law. *Griffiths Estate* holds that where no debts are owed to the succession, the Court has no jurisdiction to appoint an administrator.

A similar situation exists in connection with foreign receivers. Under the statutes of certain states the receiver is vested with actual title to the insolvent's estate. In others he is a mere conservator empowered only to receive assets and disburse them to creditors pursuant to Court order. He has no title and is without capacity

to institute a suit to recover estate property. This general problem is discussed in *3-A, Moore's Federal Practice (2d Ed.)*, Sec. 17:20, p. 751, *et seq.*

Fallat v. Gouran, 220 F. 2d 325 (CCA 3, 1954), dealt with a situation identical to the case at bar, i.e., suit by a foreign guardian of a resident ward. The Court, at page 328, pointed out that prior cases referring to the effect of state law on capacity to sue were decided under the Conformity Act of June 1, 1872, 17 Stat 196, long since abrogated.[1] The Court questioned whether state law had any effect under the present Federal Rules stating at p. 328:

> "Here appears an ambiguity, perhaps more apparent than real, between the provisions of subparagraphs (b) and (c) of Rule 17. Rule 17(b) seems to refer to the law of the state of the forum in determining the capacity of the guardian to sue in the Federal Court and in this respect might perhaps be regarded as adopting the result of earlier cases decided under the Conformity Act. *Rule 17(c), however, apparently gives a guardian the right to sue in the Federal Courts irrespective of his capacity under state law. From this it might be argued, in spite of Moore and Barron & Holtzoff, that Rule 17(b) does not apply to guardians but that their capacity to sue in the Federal Courts now stands solely on the basis of Federal Law.*" (Emphasis supplied)

It has been held that Louisiana State Court procedural

---

[1]This would be true of the case of *Morgan v. Potter* 15 S. Ct. 590 (1895), cited and quoted by the trial Court (App. p. 12 INFRA).

rules have no application to suits in the federal forum. In *Bengtson v. Travelers Indemnity Company*, 132 F. Supp. 512 (W.D. La. 1955), the defendant argued as does defendant here, that a guardian ad litem could not maintain suit in the Federal Court and only a tutor or tutrix could be the proper party to sue in a minor's behalf. The Court, at p. 516, stated:

> "THE LOUISIANA CODE OF PRACTICE IN ITS VERY NAME AND NATURE, IS AN ADJECTIVE BODY OF LAWS. THE LOUISIANA CIVIL CODE, WHILE DEALING PRINCIPALLY WITH SUBSTANTIVE RIGHTS AND OBLIGATIONS, ALSO IS REPLETE WITH PROCEDURAL RULES. ALL OF THE ARTICLES FROM BOTH CODES, RELIED ON HERE BY DEFENDANTS AND QUOTED ABOVE, OBVIOUSLY ARE PROCEDURAL: AND THE LOUISIANA CASES CITED BY DEFENDANT CONSEQUENTLY ARE LIMITED IN EFFECT TO STATE COURT, NOT FEDERAL LITIGATION." (Emphasis supplied)

In *Bengtson* the District Court quoted authority reaffirming the principle that only state *substantive* as opposed to *procedural* law applies to federal court litigation (p. 516, F.N. 5):

> "See also *Occidental Life Ins. Co. of California v. Kielhorn*, D. C. 98 F. Supp. 288, 293: " Under the holding in *Guaranty Trust Co. of New York v. York*, supra, 326 U.S. (99) at page 109, 65 S.Ct. (1461) at page 1470, 89 L. Ed. 2079, the following test should be applied in determining

> whether or not a Federal Court in a diversity suit should follow a state law: If the law does 'significantly affect the result of a litigation' and 'the outcome of the litigation,' it constitutes the substantive law of the State and should be followed. *However, if it 'concerns merely the manner and the means' by which the rights of the parties are determined, it is the procedural or adjective law of the State and need not be followed.* In *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, at page 14, 61 S. Ct. 442, at page 426, 85 L. Ed. 479, the court said: '*The test must be whether a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.*'" (Emphasis supplied)

While *Guaranty Trust Co. of New York v. York*, supra, does not deal with F.R.C.P. 17(b) it does constitute a definite statement that state procedural rules do not control suits in federal courts.

The principal authority relied upon by the Fifth Circuit demonstrates the confusion and uncertainty as to F.R.C.P. 17(b) (c) and the pressing need for clarification by a ruling from this Honorable Court. The Fifth Circuit cites *2, Barron and Holtzoff, Federal Practice and Procedure* (Wright Ed., 1961), Sec. 488 in support of its affirmance of the trial Court's decision. However, this authority states:

> "Under Rule 17(c) the general guardian . . . may sue or defend on behalf of an infant or incompetent person. *It is not yet entirely clear*

> *to what extent state law controls the right of such a representative to bring suit in Federal Court. Prior to the rules, under the Conformity Act, state law was considered determinative as to the right of a guardian to sue.* Rule 17(c), purporting to give an unqualified right to the guardian to sue, might be thought to have altered this rule, but rule 17(b) confuses this issue by making the capacity of a representative to sue defendant on the law of the state in which the district Court is held."

In short, the proper construction of rule 17(b), and also its being harmonized with rule 17(c), are unresolved.

Plaintiff urges that the effect of the rulings below reach far beyond her rights in this particular case and, if affirmed, will constitute a confusing and unfortunate precedent. Nationwide uniformity has been and is a primary objective of the Federal Rules of Civil Procedure; *Erie Railway v. Tompkins* 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, and its progeny have re-affirmed this on numerous occasions.

We submit that to engraft State Court procedure onto the Federal Rules is improper and that, accordingly, this decision should be reversed.

Respectfully submitted

RAYMOND H. KIERR
1718 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112

Of Counsel:
ROBERT G. HEBERT
J. STANLEY WAGNER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon counsel for all parties by mailing the same to each properly addressed and postage prepaid on this _____

day of _____, 19_____

_____

APPENDIX A

MINUTE ENTRY

MITCHELL, J.

MARCH 20, 1969

MARY VIRGINIA SLADE, GENERAL GUARDIAN OF ROBERT ELKINS AND MARK DAVID BROOKS

versus

LOUISIANA POWER & LIGHT COMPANY

CIVIL ACTION
NO. 68-1460
SECTION F

This matter came before the Court on a former day on defendant's motion to dismiss and, for the reasons hereinafter assigned, the motion is granted.

The complaint alleges that on February 4, 1968, the minor children, Robert Elkins and Mark David Brooks, suffered personal injuries in Kenner, Louisiana, as a result of defendant's negligence.

On July 16, 1968, the Chancery Court of Harrison County, Mississippi, appointed Miss Mary Virginia Slade, a Mississippi resident, general guardian of the two minors and, shortly thereafter, she filed this suit, alleging diversity jurisdiction.

Defendant, Louisiana Power & Light Company, filed motion to dismiss, challenging the capacity of Miss Slade to bring this action.

The principal issue upon which the motion is based is whether a Mississippi resident, appointed general guardian by a Mississippi Court of two Louisiana minors, each of whom has at least one parent living and domiciled in Louisiana, has the capacity to bring suit in a federal court sitting in Louisiana.

It is firmly established that in diversity actions the residence of a general guardian, and not that of the ward, controls.

The Supreme Court upheld the capacity of a guardian appointed by a Texas State Court to represent an Illinois minor in a suit brought in a federal court sitting in Texas, saying:

> "If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff and not the ward so far as federal jurisdiction is concerned."[1]

Rule 17(b) of the Federal Rules of Civil Procedure provides that the capacity of an individual suing in a representative capacity shall be determined by the law of the state in which the District Court is held.[2]

> "The authority of a guardian, like that of an executor or administrator, appointed by a court

---

[1] *Mexican Central Railroad Co. v. Eckman*, 187 US 428, 23 S. Ct. 211 (1903).

[2] *Brimhall v. Simmons*, 338 F2d 702 (CA 6-1964); *Danos v. Waterford Oil Co.*, 266 F2d 76 (CA 5-1959).

> of one state is limited to that state, and he cannot sue in a court, even of the United States held within any other state except so far as authorized to do so by its laws."[3]

Based upon the foregoing authorities, Louisiana law will determine whether Miss Slade has the capacity to bring suit on behalf of the two minor children.

In support of its motion, defendant filed the depositions of Mr. and Mrs. Alfred Sidney Elkins, the parents of Robert, and the deposition of Mrs. Mae Brooks, the widowed mother of Mark David, which reflect that the parents of the minor children were domiciled in the State of Louisiana long before, and have been continuously since, the birth of the minors in 1956. The Elkins and Brooks families are neighbors and the accident of February 4, 1968, occurred in the backyard of the Elkins home.

These depositions further reflect that: the Elkins child presently resides with his parents in Kenner, Louisiana; has done so since his birth; and has been continuously under their care, custody and control; the Brooks child, whose father died in 1967, resided with both parents in Kenner, Louisiana; and has been residing there with his mother, under her sole care, custody and control, since his father's death.

There can be no doubt that the parents of the minors are domiciled in Louisiana, and the domicile of an unemancipated minor is that of his father, mother, or tutor.[4]

Under Louisiana law, Alfred Sidney Elkins, the father

---

[3] *Morgan v. Potter*, 15 S. Ct. 590 (1895).
[4] Art. 39 of La. C. C.

of the minor, Robert Elkins, is the administrator of his minor son's estate and is the proper party to sue to enforce a right of an unemancipated minor.[5]

Mrs. Mae Brooks, the surviving parent of Mark David Brooks, is the natural tutrix of his minor son.[6]

On February 3, 1968, the 24th Judicial District Court, Jefferson Parish, Louisiana, appointed Mrs. Brooks natural tutrix of her minor son, Mark David.

Under Louisiana law, the tutor appointed by a Court of this state is the proper party to sue to enforce a right of an unemancipated minor when one or both of the parents are dead.[7]

On February 3, 1969, the father of Robert Elkins (individually and as the administrator of his son's estate) and the mother of Mark David Brooks (individually and as tutrix of her minor son) filed suit against the defendant Louisiana Power & Light Company, in the Louisiana State Court for damages arising out of the accident of February 4, 1968.

Art. 248 of the Louisiana Civil Code provides that

> "Tutorship by nature takes place of right . . . In every other kind of tutorship the tutor must be confirmed or appointed by the Court."

Art. 4031 of the Louisiana Code of Civil Procedure concerns the appointment of a tutor for a minor domiciled in Louisiana:

---

[5]Art. 683 of La. C. C. P.
[6]Art. 250, La. C. C.
[7]Art. 683, La. C. C. P.

> "A petition for the appointment of a tutor of a minor domiciled in the state shall be filed in the district court of the parish where the surviving parent is domiciled . . . In all other cases, the petition shall be filed in the parish where the minor resides."

The appointment of tutors belongs to courts of the minors domicile, and courts of this state could attach no validity to appointments made by courts of other states of guardians for minors domiciled in this state.[8]

Since the Louisiana statutes were amended in 1964, a non-resident may be appointed by a Louisiana Court as tutor of a Louisiana minor,[9] but we can find no Louisiana statutes which authorize suits in Louisiana by guardians appointed in another state to represent minors domiciled in Louisiana.

---

[8] *Succession of Vennard*, 11 So. 705 (1893).
[9] Arts. 4034, 4234, 4264 and 4273 of La. C.C.P.; See 25 LLR 36.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27946
Summary Calendar

MARY VIRGINIA SLADE, General Guardian of ROBERT ELKINS and MARK DAVID BROOKS,

Plaintiffs-Appellants,

versus

LOUISIANA POWER AND LIGHT COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(October 24, 1969)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges

PER CURIAM: Pursuant to Rule 18 of the Rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing.

See *Murphy v. Houma Well Service*, 409 F.2d 804 (5th Cir. 1969).

The sole issue on this appeal is whether a general guardian of minor children, appointed by a state court in Mississippi, has the power under Fed. R. Civ. P. 17(b) or 17(c) to sue as such guardian in the federal district court of Louisiana when she would lack the power to sue in such capacity in the state courts of Louisiana.[1] The district court answered in the negative. We agree and affirm.

It is well settled that ". . . where a guardian or other representative of a minor already has been appointed and qualified by a state court, his capacity, when he seeks to act in federal court, is tested by the law of the state in which the district court is held, but if an infant or incompetent does not have a validly appointed state representative, the federal court in which suit is brought may name a guardian ad litem or next friend to represent him, regardless of state law." 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Wright ed., 1961) § 488. Accord: *Travelers Indemnity Co. v. Bengtson*, 231 F.2d 263 (5th Cir. 1956), *aff'g* 132 F. Supp. 512 (W.D. La., 1955); *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955); *Brimhall v. Simmons*, 338 F.2d 702 (6th Cir. 1964). See also 3A MOORE, FEDERAL PRACTICE, (2d ed., 1969) ¶ 17.26.

Similar to the instant case, and illustrative of the principle involved, is *Frankel v. Styer*, 201 F. Supp.

---

[1]Since the minor children involved in this case do not reside outside Louisiana, only a tutor appointed by a Louisiana state court or the father or mother of these children can bring an action on the children's behalf in the state courts of Louisiana. LSA-C.C.P. arts. 683, 4431. Plaintiff Mary Virginia Slade does not fit within any of these three categories, and therefore lacks capacity to sue in Louisiana State Court.

726, (E.D. Pa., 1962). A duly qualified guardian of minor children brought an action in the federal district court for the wrongful death of the children's father. In dismissing the action the court held that since the guardian of minor children was without power to sue on behalf of a class in the state courts of Pennsylvania he could not sue on behalf of a class in a diversity suit in the federal courts.

AFFIRMED.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 13 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1109

MARY VIRGINIA SLADE, General Guardian of ROBERT ELKINS and MARK DAVID BROOKS,
Plaintiff,

versus

LOUISIANA POWER AND LIGHT COMPANY,
Defendant.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MONROE & LEMANN
Andrew P. Carter
Eugene G. Taggart
1424 Whitney Building
New Orleans, Louisiana 70130
Attorneys for Louisiana Power & Light Company.

LIST OF AUTHORITIES

FEDERAL CASES

Bengtson v. Travelers Indemnity Company, 132 F. Supp. 512 (W.D. La. 1955), 231 F. 2d 263 (5th Cir. 1956) 2

Brimhall v. Simmons, 338 F. 2d 702 (6th Cir. 1964) 3

Danos v. Waterford Oil Company, 266 F. 2d 76 (5th Cir. 1959) 3

Fallat v. Gouran, 220 F. 2d 325 (3rd Cir. 1954) 3, 8

Martineau v. City of St. Paul, 172 F. 2d 777 (8th Cir. 1949) 8

McSparran v. Weist, 402 F. 2d 867 (3rd Cir. 1968) (Cert. Den. 37 L.W. 3443) 8

STATE CASES

Succession of Vennard, 11 So. 705 (1893) 6

FEDERAL STATUTES

28 U.S.C.A. § 1359 9

§ 1332 9

Federal Rules of Civil Procedure, 17(b) 2

17(c) 2

STATE STATUTES

Louisiana Civil Code, Article 39 5

Article 250 7

Louisiana Code of Civil Procedure, Article 221 6

Article 683 6

Article 4031 7

Article 4431 5

Article 4501 6

OTHER

2 Barron & Holtzoff, Federal Practice and Procedure (Wright ed., 1961), § 488, pp. 60-61 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1109

MARY VIRGINIA SLADE, General Guardian of ROBERT ELKINS and MARK DAVID BROOKS,

Plaintiff,

versus

LOUISIANA POWER AND LIGHT COMPANY,

Defendant.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

Counsel for the petitioner seeks to invoke the diversity jurisdiction of the Federal District Court sitting in Louisiana in this tort action on behalf of two Louisiana minor children (Robert Elkins and Mark David Brooks) against a Louisiana defendant (Louisiana Power & Light Company) by erecting as the plaintiff in this tort action a Mississippi resident, who was named a general guardian for the said minor children by a state court in Mississippi. Counsel's strategy, however, fails to reckon with

Rule 17(b) of the Federal Rules of Civil Procedure, because, under the provisions thereof, the capacity of the plaintiff to appear in the Federal District Court on behalf of the said minor children shall be determined by the law of Louisiana in which the Federal District Court is held. Rule 17(b) provides, in pertinent part, as follows:

> "Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . .*" (Emphasis added)

Under the law of Louisiana, the petitioner has no capacity to sue on behalf of the said minor children, and the capacity to sue on their behalf is vested in their parents, who have already instituted suit on this tort action in the state court on behalf of the said minor children.

The reliance placed on the case of *Bengtson v. Travelers Indemnity Company* by the plaintiff's counsel at pages 4 and 5 of their brief is misplaced. In the *Bengtson* case, the two resident minors were unrepresented, having lost their parents as a result of the accident being sued upon, and the Federal District Court, under authority of Rule 17(c) of the Federal Rules of Civil Procedure, appointed a guardian *ad litem*, without the necessity of following the capacity law of the state.

In the instant case, however, the plaintiff is claiming

that the resident minors are represented by her as general guardian under an order of a state court in Mississippi, and, therefore, Federal Rule 17(b), along with 17(c), is applicable herein. Under Rule 17(b), the plaintiff's capacity to sue must be determined by the law of Louisiana, the state wherein the district court is located. 2 Barron & Holtzoff, Federal Practice and Procedure (Wright ed., 1961), § 488, pp. 60-61:

> ". . . [W]*here a guardian or other representative of a minor already has been appointed and qualified by a state court, his capacity, when he seeks to act in federal court, is tested by the law of the state in which the district court is held*, but if an infant or incompetent does not have a validly appointed state representative, the federal court in which suit is brought may name a guardian ad litem or next friend to represent him, regardless of state law." (Emphasis added)

See also *Danos v. Waterford Oil Company*, 266 F. 2d 76 (5th Cir. 1959); *Brimhall v. Simmons*, 338 F. 2d 702 (6th Cir. 1964).

The case of *Fallat v. Gouran* cited by plaintiff's counsel at pages 3 and 5 of their brief is also distinguishable from the instant case, because in the *Fallat* case the plaintiff's capacity to maintain the suit under the law of the state in which the district court sat was not at issue. The Third Circuit Court of Appeals in the *Fallat* case merely pointed out that for the purposes of determining diversity jurisdiction, the citizenship of the guardian would be controlling "if he [guardian] has the capacity to sue". In the instant case, the plaintiff does not have the capacity to sue and the *Fallat* case is inapposite.